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RECORD OF ORAL HEARING

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte NEIL MCCLURE

Appeal 2009-004508
Application 10/074,839
Technology Center 3600

Oral Hearing Held: September 9, 2009

Before MURRIEL E. CRAWFORD, JOSEPH A. FISCHETTI, and
BIBHU R. MOHANTY, *Administrative Patent Judges.*

ON BEHALF OF THE APPELLANT:

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The above-entitled matter came on for hearing on September 9, 2009 at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia, before Timothy J. Atkinson, Free State Reporting, Inc.

PROCEEDINGS

MR. CLEVELAND: Okay, thank you. Well, my name is Dan Cleveland, and I am appearing on behalf of the Patent Owner. In terms of the timing, I understand I have 15 minutes to speak. Is that correct?

JUDGE CRAWFORD: Yes, about that time.

MR. CLEVELAND: Okay, and then I can -- I have some -- I have an option to reserve some time, perhaps 5 minutes, for rebuttal at the end?

JUDGE CRAWFORD: Right, but there is nobody to rebut.

MR. CLEVELAND: Oh, the Examiner is not present?

JUDGE CRAWFORD: No.

MR. CLEVELAND: Okay, then I'll just go -- I'll just proceed. We have at issue are some claims to an electronic voting system that implements a scheme of ballot rotation, and although I'm here primarily to answer questions that the Board may have, I would like to just put some opening remarks out there.

The limitation at issue is found in each of the independent claims 1, 24 and 43, and although it's one phrase in terms of the language, we've found at least seven ways to disagree with the Examiner about this, and it's the last sentence -- the representative language is found in the last paragraph of claim 1 where we have a ballot rotation engine that generates a rotated ballot on demand in a manner that assures substantially equal statistical fairness, and this is implemented over at the level of a voting precinct, a group of precincts supported at a single polling place or an entire election jurisdiction. So basically the precinct in any larger -- it's implemented at the precinct level or any larger group of precincts.

1 So the prior art in combination, we primarily disagree with the
2 Examiner over his interpretation of Openshaw and Miller in two regards.
3 Number one, the Examiner finds that in paragraph 20 of Openshaw, this
4 teaches rotating the ballot in terms of rotating the candidate names or the
5 election options within a single contest. It does not -- it teaches rotating the
6 category which in terms of Openshaw, which is a telephonic voting system,
7 it teaches rotating the order of elections, and there has never been any study
8 that shows that there's any statistical imbalance in rotating the order of
9 elections so I have the, you know, vote for the president, vote for the
10 dogcatcher, vote for the senator. Whether I put those elections in any
11 particular order doesn't really matter statistically. What matters is rotation at
12 the level of say the candidate names for president. So we might have
13 George Bush, Barack Obama, etc. in any particular contest, and then we
14 would present those in different order. Whichever candidate appears first
15 appears to have an unfair advantage, and so as we explained on pages 2
16 through 6 of the patent specification, the ordering schema is particular
17 according to the law of the various states, various aspects of what -- and
18 uniformly, at least at the time of the invention, uniformly these laws were all
19 intended to address paper ballots. So what we're suggesting here to generate
20 the rotated order on demand according to this limitation would be actually
21 contrary to the law of the various states, not because it's bad. It's just that the
22 processes that are set up to do paper voting contemplate paper ballots, and
23 they just don't accommodate the generation of rotation on demand.

24 Furthermore, there is no jurisdiction in the United States that would
25 permit this to be done in a randomized way as stated in claim 15, and so this
26 kind -- and so the illegality of it, if you will, the unnecessary illegality of it,

1 if you will, directly refutes the Examiner's contention that it would just be a
2 combination of both elements. First of all, it's not. The Examiner applies
3 Miller, the Miller reference, and says that Miller teaches the rotation of
4 ballots to assure substantially equal statistical fairness. So if you go -- but it
5 does not -- note it does not say this. If you go to page 298, what they say
6 here is see appendix B for the, you know, for a detailed description of the
7 manner in which the rotations were performed. Then page 324 is appendix
8 B. They talk about Franklin County being rotated so that each precinct in
9 Franklin County was assigned to a particular ordering of candidates' names.
10 So they're rotating on the precinct level, and the reason why rotating a single
11 ballot through different precincts does not achieve statistical fairness is that
12 there are different numbers of voters who appear in the different precincts.
13 So you can't get statistical fairness by rotating at the precinct level. This is
14 merely a study to report statistical advantage or disadvantage depending
15 upon where your name appears in the order assigned to a particular precinct.

16 In Cuyahoga County, it's page 325 of Miller, going down from the
17 heading Cuyahoga County, one, two, three, four paragraphs, they give the
18 example of how ballots were rotated there. Names are rotated for the race
19 for U.S. President by numbering the precincts one through three, four, five,
20 etc. and repeatedly moving the candidate name to the bottom of the list. So
21 here again, they're rotating a single ballot for each precinct.

22 On page 326, in Hamilton County they did it in the same way as they
23 did it for Cuyahoga County. So it's simply untrue what the Examiner has
24 found that Miller teaches doing this for statistical fairness. There's no way
25 of accomplishing statistical fairness by rotating single ballots through the
26 precincts, and what we have claimed is A, to do it on demand and implement

1 the program at a precinct level, a group of precincts or a jurisdiction which a
2 jurisdiction is also a group of precincts.

3 So that basically concludes my remarks, and I would like to address
4 any questions that the Board may have.

5 JUDGE MOHANTY: You talk about statistical fairness, but that's
6 an -- that's kind of an open term, isn't it?

7 MR. CLEVELAND: Yes. We present a number of schemes for
8 doing this. There is the possibility of just rotating through, taking the first
9 name and putting it last, taking the --

10 JUDGE MOHANTY: What I mean is when you say that this doesn't
11 show statistical fairness, I mean how do I know what that is, 2 percent, 3
12 percent? If a prior art shows something that's 3 percent, I mean you say
13 substantially equally fairness. I mean all it has to be is substantial -- show
14 substantially equal fairness not -- it doesn't have to show it as well as your
15 system. You haven't claimed a specific number or any evidence of affidavit
16 that yours reaches a certain level that this wouldn't.

17 MR. CLEVELAND: I believe that, you know, when we do election
18 polling, and there's a lot of statistics that apply to electioneering. I think that
19 the word substantially is ascertainable from the perspective of ordinary skill.
20 I, you know, I don't necessarily mean to pick nits over whether it's, you
21 know, 2 percent or 5 percent, but it's any statistical variation that would have
22 an appreciable effect on the outcome of an election.

23 JUDGE MOHANTY: Okay. Also in your spec, you say that I think
24 it's like 23, 24 percent of state laws now require electronic ballot rotation.
25 You also say that I think you -- electronic ballots are well known which
26 they're well known. Why wouldn't it just be obvious if KSR says that you

1 can look to the effects and demands known to the design community? Why
2 wouldn't it just be obvious if this is the law that you have to rotate ballots,
3 and everyone is using electronic ballots? Why wouldn't it just be obvious to
4 changes if the law says you have to have rotating ballots? Why wouldn't it
5 just be obvious to do this?

6 MR. CLEVELAND: Because we're not really -- the schemes in
7 those -- in the minority of jurisdictions that do require ballot rotation on
8 electronic voting machines, it is set up to accommodate the old paper ballot
9 systems. In other words, they're doing just what Openshaw does which is to
10 store ballots in a memory in terms of a pattern of ballots, so it's impossible to
11 generate the rotations on demand. So for example, if I'm -- if I've got -- and
12 not all races are rotated in those jurisdictions. Sometimes you may have like
13 a ballot initiative that does not get rotated. You may have certain elections
14 for the county that do not get rotated whereas in the state and federal
15 elections may be rotated.

16 So in other words, it's -- what we're doing in terms of generating the rotation
17 on demand would be contrary to law even in those jurisdictions that require
18 ballot rotation, so it's -- so not what -- your initial assumption is perhaps
19 untrue where you're assuming that we would simply be acting according to
20 the law; what we're doing by generating the ballot on demand would be
21 contrary to law.

22 JUDGE CRAWFORD: Do you have any further --

23 JUDGE FISCHETTI: I have a simple question here, counsel. If the
24 object is to ensure that the greatest number of people get exposed to this
25 randomness, then isn't it obvious then that you would want to put forth the

1 randomness to the entire voting population as opposed to precinct by
2 precinct?

3 MR. CLEVELAND: Yes, in a preferred embodiment, of course you
4 would, and we have in the independent claims in that -- we include an entire
5 jurisdiction as well as a precinct or a group of precincts, so -- and the
6 concept of randomization in particular is just one schema. Claim 15 and the
7 counterpart dependent claims like 15 with respect to the other independent
8 claims 23 and 43, that addresses randomness, but the schema is not limited
9 solely to randomness. Randomness, by the way, is contrary to the law at the
10 time of the -- at the application was filed, randomness was contrary to law of
11 all the states.

12 JUDGE FISCHETTI: All right.

13 JUDGE CRAWFORD: No further questions. I just want to make
14 sure, does the court reporter have the name?

15 COURT REPORTER: The attorney's name?

16 JUDGE CRAWFORD: Uh-huh, the attorney's name.

17 COURT REPORTER: Dan Cleveland.

18 JUDGE CRAWFORD: Okay.

19 MR. CLEVELAND: My name is Dan Cleveland representing the
20 patent owner Hart Inter Civic (phonetic sp.). My registration number is
21 36,106.

22 JUDGE CRAWFORD: Okay. Well, thank you.

23 MR. CLEVELAND: Members of the Board, thank you very much for
24 hearing my appeal.

25 JUDGE CRAWFORD: All right. Bye-bye.

26 MR. CLEVELAND: Bye-bye.

1 (Whereupon, the hearing concluded on September 9, 2009.)